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In re Application of
Kloepfer
Application No. 09/754,705
Filed: 4 January, 2001
Attorney Docket No.: Titan

OFFICE OF PETITIONS
ON PETITION

This is a decision on the petitions filed on 29 May, 2002:

- requesting withdrawal of the holding of abandonment under 37 C.F.R. §1.181,¹ or
- alternatively seeking to revive the instant application under 37 C.F.R. §1.137(b)² alleging unintentional delay

The petition to withdraw the holding of abandonment is **GRANTED**.³

The petition under 37 C.F.R. §1.137(b) is **DISMISSED as moot**.

¹ The regulations at 37 C.F.R. §1.181 provide, in pertinent part:

§1.181 Petition to the Commissioner.

(a) Petition may be taken to the Commissioner: (1) From any action or requirement of any examiner in the *ex parte* prosecution of an application which is not subject to appeal to the Board of Patent Appeals and Interferences or to the court; (2) In cases in which a statute or the rules specify that the matter is to be determined directly by or reviewed by the Commissioner; and (3) To invoke the supervisory authority of the Commissioner in appropriate circumstances. * * *

(b) Any such petition must contain a statement of the facts involved and the point or points to be reviewed and the action requested. Brief or memoranda, if any, in support thereof should accompany or be embodied in the petition; and where facts are to be proven, the proof in the form of affidavits or declaration (and exhibits, if any) must accompany the petition.

(c) When a petition is taken from an action or requirement of an examiner in the *ex parte* prosecution of an application, it may be required that there have been proper request for reconsideration (§1.111) and a repeated action by the examiner. The examiner may be directed by the Commissioner to furnish a written statement, within a specified time, setting forth the reasons for his decision upon the matters averred in the petition, supplying a copy thereof to the petitioner.

(d) Where a fee is required for a petition to the Commissioner the appropriate section of this part will so indicate. If any required fee does not accompany the petition, the petition will be dismissed. * * *

(f) Except as otherwise provided in these rules, any such petition not filed within 2 months from the action complained of, may be dismissed as untimely. The mere filing of a petition will not stay the period for reply to an Examiner's action which may be running against an application, nor act as a stay of other proceedings. * * *

² Effective December 1, 1997, the provisions of 37 C.F.R. §1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 C.F.R. §1.137(b). a grantable petition filed under the provisions of 37 C.F.R. §1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 C.F.R. §1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. §1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee set forth in 37 C.F.R. §1.20(d)) required pursuant to 37 C.F.R. §1.137(c). (Emphasis supplied.)

³ The petitions were supplemented via FAX on 31 May, 2002, with authorization for payment of the Issue Fee.

The record indicates that:

- it appeared that Petitioner failed to respond timely and properly to the Notice of Allowance and Issue Fee Due mailed on 17 October, 2001, and due under a non-extendable deadline on or before 17 January, 2002;
- thus, the application was deemed abandoned after midnight on 17 January, 2002;
- it appears that no Notice of Abandonment was mailed;
- as indicated above, the petition under 37 C.F.R. §1.181 was filed on 29 May, 2002, with:
 - what purports to be a copy of Petitioner's incoming-mail log for the period 15 October through 30 November, 2001, and no reference appears as to the Notice of Allowance and Issue Fee Due (or any other Office action) as to the instant application; and
 - a declaration by Counsel, *inter alia*, that a review of his records indicates that no such materials were received until later transmitted by the Examiner on 22 May, 2002, upon inquiry by Petitioner.

(Petitioner errs in his declaration wherein he states that he was directed by the Office of Petitions to file a petition under 37 C.F.R. §1.181 and a petition under 37 C.F.R. §1.137(b). Rather, Petitioner was informed that if the record supported an allegation of non-receipt, then a petition under 37 C.F.R. §1.181 could be grantable, but failing that a petition under 37 C.F.R. §1.137(b) might be required.)

- while Petitioner has captioned the filing of 29 May, 2002, as a petition alternatively pled under 37 C.F.R. §1.137(b), notably Petitioner fails to make the statement required under the rule;⁴ and
- the petitions were supplemented via FAX on 31 May, 2002, with authorization for payment of the Issue Fee.⁵

In view of the statement of Counsel, the copy of the incoming-mail logs, Petitioner has demonstrated initial non-receipt of the Notice of Allowance and Issue Fee Due.

Accordingly, the holding of Abandonment is withdrawn--it is unnecessary to vacate a Notice of Abandonment because none was mailed. The petition fee is waived.

Accordingly:

- the petition to withdraw the holding of abandonment is **granted**; and
- the petition under 37 C.F.R. §1.137(b) is **dismissed as moot**.

⁴ See: Fn. 2, item 3, above, to wit: " (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. §1.137(b) was unintentional."

⁵ Pursuant to Petitioner's authorization, the Issue Fee (\$640.00) and the cost of 10 copies of the patent (\$30.00) are charged to Deposit Account 02-0915.

This application is being forwarded to Publications Branch to be processed into a patent.

Telephone inquiries regarding this decision should be directed to the undersigned at (703) 305-9199.



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